555 Capitol Mall, Suite 1200
Sacramento, California 95814
tel (916) 556-1531
fax (916) 556-1516
www.meyersnave.com

Katherine Cook
Attorney At Law
kcook@meyersnave.com

meyers | nave

MEMORANDUM

ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGED; CONFIDENTIAL

DATE: March 28, 2018; updated April 6, 2018

TO: Mayor Stan Nader
Councilmember Gabriel Hydrick
Councilmember Peter Gilbert
Councilmember Paul Joiner
Councilmember Dan Karleskint

CC: City Attorney Kristine Mollenkopf

FROM: Katherine A. Cook

RE: **Fact Finding Investigation Concerning City Water Use**

Dear Members of the City Council:

In January of this year, the City Council authorized a fact-finding investigation into the City of Lincoln's long-time practice of not directly billing itself for its own water use. This direction came after a group of residents raised the issue in late 2017 and demanded that the practice cease to ensure the City is in full compliance with Proposition 218 requirements.

This memorandum analyzes the factual background concerning the City's practice of not billing itself directly for its own water use. The memorandum establishes a general timeline, and puts forth factual conclusions based on the information gathered from emails,[1] City

[1] A power outage in City Hall in December 2016 caused irrevocable damage to an email server and as a result emails from many former employees were irrecoverable. This included emails from former City Manager Jim Estep.

records, consultant reports, attorney files, and interviews with seventeen individuals.[2] It also contains general information regarding this practice as it relates to applicable state laws. Although it is not best practice under Proposition 218 for a city to not directly bill itself for water use, it is potentially defensible if certain findings are made.

This memorandum does not fully evaluate the defensibility of this practice, as the direction received was to focus the investigation on the factual history of the City's practice and the failure to modify it. Nor does the memorandum evaluate possible professional negligence related to this practice, as this was not the direction received.[3]

The major conclusions of this investigation are as follows:

1) The City of Lincoln has never, until recently, directly billed itself for its own water use. This appears to be a practice that, despite a general awareness of it among staff, continued over time because it was one of numerous priorities for City leadership to address in a City growing at a rapid pace and facing financial difficulties.

2) Many factors appear to have contributed to this practice not being modified sooner, including unprecedented City growth in the early 2000s, financial problems resulting from the 2008 recession, staff and department head turnover (especially within the finance department), an intense focus on the "tiered" water rate model—and the challenges to it—adopted in 2013, work related to the landscaping and lighting districts and its impact on this issue, and the anticipation of the current water rate study addressing the matter head-on. The current water rate study has been in the works since early 2017 and is nearing completion.

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[2] Interviews were conducted with: City Manager Matthew Brower, Mayor Stan Nader, Councilmembers Paul Joiner, Gabriel Hydrick, and Peter Gilbert, former City Councilmember Spencer Short, former City Attorneys Jonathon Hobbs and Mona Ebrahimi, former Assistant City Attorney Leslie Walker, former Interim City Attorney Bruce Cline, former Public Services Directors Mark Miller and John Pedri, former City finance consultant and Interim City Manager Bill Zenoni, LIFT members Ted Jones and Tony Manning, Finance Director Steve Ambrose, Public Services Director Jennifer Hanson, HF&H consultants John Farnkopf and Rick Simonson, City Engineer Ray Leftwich, and City Treasurer and Ad Hoc Water Rate Committee Chair Gerald Harner. Former City Manager Jim Estep could not be reached.

[3] It should be noted that that statutes of limitations have likely run on any causes of action for possible professional negligence as it may relate to this matter. The clock generally starts when the injured party first has notice of, or should reasonably have had notice of, the conduct in question. A second memorandum analyzing the issue of professional negligence related to this practice will be prepared for the City, per direction from the City Attorney.

3) **The City and the public were put on notice of this practice as early as 2004**. The City's 2004 Water Rate Study, conducted by Hilton Farnkopf & Hobson, LLC ("HF&H"), highlights the fact that the City's own water use is only partially metered and clearly recommends that the City meter and pay for all of its water use to be fully compliant with Proposition 218.

a) There was not a similar recommendation in the 2013 Water Rate Study by HF&H.

b) There is a note in the 2013 study indicating that certain City water use data ("City Irrigation") was not included in the analysis. There are other data points in the study to indicate that certain municipal water use was not being billed.

4) Current and past City management and department heads were aware of this practice for many years, yet meaningful progress on installing meters on City property and gathering the water use data did not begin until 2015.[4]

5) It is more likely than not that the City Attorney's office advised City management and City Council, as early as 2011, to change this practice. The City Attorney's Office advised staff in 2015 and again in 2016 that a new water rate study was critical, that it must include the City's own water use data, and that park irrigation must be paid for by the City. The City Attorney's office also specifically advised City staff in 2017 that fire protection costs must come from the general fund and that customer water rates should not include costs associated with unmetered water use by the Fire Department, such as a grass fire.[5]

6) Public Services Director Jennifer Hanson first informed City Manager Matt Brower of the practice in early 2015, when Brower started at the City, as one of her top priorities.

[4] Emails and records show that staff began gathering data on City meter needs in earnest in 2015, although possibly as early as 2013.

[5] June 2017 emails from former City Attorney Mona Ebrahimi to City Engineer Ray Leftwich, Finance Director Steve Ambrose, Public Services Director Jennifer Hanson and City Manager Matt Brower specifically addressed fire protection issue.

a) Hanson pushed to include the City's own water use costs in the 2016-2017 budget, but was unsuccessful.[6] It is not clear whether this was an active or passive decision by the City Manager.

b) Hanson was successful in getting the item into the 2017-2018 budget, yet it was not highlighted as a major change during the public meetings on the budget.

7) Finance Director Steven Ambrose has been aware of the City's practice for several years, yet did not push to amend the City budget until it was fully clear *how* the City's water use would be funded. Ambrose had serious concerns about the impacts this change would have on the general fund, and also wanted to be confident that the landscaping and lighting district zones were included in the adjustment in the proper manner.

8) When Interim City Attorney Bruce Cline was made aware of the practice in December 2017, he conferred with City Manager Matt Brower and other staff. Ambrose informed Cline that the City was aware of the practice. It is unclear what Brower communicated to Cline regarding his level of knowledge about the practice, but Brower was aware of it as early as February 2016 and possibly earlier.

I. BACKGROUND AND TIMELINE

In late 2017, the issue of the City not directly billing itself for water use came to the attention of City management and Councilmembers through the "LIFT" group. This group of City residents is extremely active in water rate matters. Since 2016 they have pushed the City to modify its tiered water rate structure; they have argued it is not legal following the 2015 California Court of Appeal decision in *Capistrano Tax Payers Association v. San Juan Capistrano,* which held that a city's tiered water rates must be justified based on the incremental costs of providing water service to each tier.

During its efforts, the LIFT group inquired about the City's "water loss" rate, or the percentage of water used but not billed to the City.[7] As a result of LIFT's inquiries, which included public records requests for water bills to City accounts, the group reported to

[6] Hanson sent an email in February 2016 to Finance Director Steve Ambrose (cc'd to City Manager Matt Brower and City Attorney Jon Hobbs) suggesting that the Parks Department pay its water bills in the 2016-2017 budget.

[7] Water loss typically includes unbilled for water such as water lost through leaks, main flushes, fire suppression, and theft.

Councilmembers and City management that the City was not in the practice of directly billing itself for its own water use.

Interim City Attorney Bruce Cline became aware of this in late December 2017 and had a strong response. Cline called in city management and key staff to gather information. He also called each Council Member to inform them of the situation.[8]

This is not the first time the City was made aware of this issue. The timeline below summarizes relevant facts related to this practice.[9]

DATE	**EVENT**
May 2004	HF&H provides City with a draft copy of 2004 Water Rate Study. Council receives study as part of a May 11, 2004 public hearing where a water rate increase is adopted. The study includes the following statements: **Page 6**, in the "Recommendations" section: "***High unaccounted for water.*** There is an unusually high amount of unaccounted for water because of its unmetered customers and construction water….To correct all of the deficiencies, currently unavailable data on the sizes of meters would be needed. In addition, a more exacting accounting for unaccounted for water would also be needed." **Page 10**, in the "Recommendations" section: "***Unmetered customers.*** Install meters on all customers and bill for their metered water use." **Page 24:** "It should be noted that only 81.3% of the total purchased and pumped water is accounted for through actual meter readings. The remaining 19.7% consists of other water use, water losses, and unaccounted for water…."

[8] It should be noted that the City Council waived the attorney-client privilege and Brown Act confidentiality for purposes of this investigation. All attorneys interviewed, as well as former Councilmember Spencer Short expressed concerns about this and requested verification of the waiver prior to speaking with Kate Cook.

[9] A fact is established in this report when it is established, based on interviews and document review, that there is credible evidence, on a more likely than not basis, to prove the information.

	Page 25: "The City's municipal water use is only partially metered. None of this water use is billed. We recommend that the City meter all of its water use and pay for water use as required under Proposition 218." (It is then noted that this "is largely a paper transaction. The payments made by the City to the Water Fund for municipal water use will be reimbursed by the Water Fund as part of its direct allocation of City overhead. Regardless of the circularity of this transaction, accounting for all water uses is important to gaining a full understanding of unaccounted for water." **Page 25: "**Unaccounted for water may be water used by construction accounts, unmetered accounts, or the City. It may also be part of the water loss. Until all of the City's accounts are metered and the meters are read, it is impossible to accurately estimate unaccounted for water."
2006	City staff worked on plans for Foskett Regional Park. Ray Leftwich, an engineer in the Public Services Department (and current City Engineer), inquired with his boss, John Pedri, about how to account for City water use at the park. Pedri informed Leftwich that the City did not pay for its water use and that the cost should not be included in the plans.
March 2006	City adopts water rate increase. Documents related to increase do not highlight city water use.
2011	Former City Attorney Jon Hobbs has a general recollection of a closed session near the start of his appointment with the City where he advised Council and City Management to change the City's practice of not directly billing itself for water. Former Councilmember Spencer Short has a similar recollection. Mayor Stan Nader recalls a closed session where the item was discussed and, the matter was discussed, but the message from management was that the funds to address it were not available.
October 2013	HF&H Water, Wastewater, and Solid Waste Rate Study. Adopted by City Council. The study does not make statements or recommendations on the unmetered accounts or City water use, as the 2004 study did. It does, however, include certain relevant information:

	Page 10, under the "Operations and Maintenance Expense" heading: Statement that the water utility makes transfers to the general fund "for services provided to the water enterprise" and that the "City conducts annual analyses to allocate governmental overhead to each of the enterprises to ensure that each enterprise provides full reimbursement for services received."[10] **Appendix A, page 19, line 22:** Table 11, "Service Charge Transition," states in note 1 that the total active accounts included in the data "Excludes Outside City and Irrigation—City Meters" **Appendix A, page 19, line 34:** Statement regarding the 81 customers listed as "City—Irrigation" and their water usage was "ignored as part of calculation." **Appendix A, page 4, line 17:** "Water loss" is presumed at 10%. This is much lower than the 2013 study, which was around 19%. On page 18 of the appendix, water loss for 2012 is listed as 13.2%. **Appendix A, page 13, line 17:** 81 accounts are listed under the "Irrigation – City" customer class. The revenue amount listed for this class is $0. This customer class is not specifically listed in the main study (see page 15). **Appendix A, page 13, line 36; page 14, lines 51 and 63:** The "Irrigation—City" customer class is listed in the tables. Revenues for this class are listed as $0 in each table. **Appendix A, page 18:** Table 10 shows "Irrigation—City" customer class as using 764,000 gallons for the one-year period shown.

[10] Review of City Attorney files and notes on draft versions of the 2013 study indicates that City Attorney Jon Hobbs may have directed staff to include information about the fund transfers in a manner that establishes they are part of the costs of running the enterprise. His notes indicate this language should be moved to a more appropriate section of the study; it appears the advice was followed.

October 2013	During the two public hearings on the adoption of the new water rates, based on the HF&H study, there is no direct discussion of the City's water use or data in the study related to the use. Former Councilmember Spencer Short, who was heavily involved in the subcommittee work on the study and water issues generally, recalls that in 2013, he assumed that the issue was addressed because the "water loss" numbers had dropped significantly.
Fall 2013-Early 2014	City management and department heads were involved in numerous meetings with Francisco & Associates consultants concerning the landscaping and lighting district (LLMD) zones and the need to modify their structure, including the need to bill themselves for water use.
November 2013	Francisco & Associates consultant Jennifer White sent an email to then-City finance consultant Bill Zenoni (cc'd to City Manager Jim Estep, Public Services Director Mark Miller and other staff) summarizing a meeting where use of the LLMD fund balance was discussed. The message listed four major items to focus expenditures on: "1. Funding a Senior Lead Main Worker…" "2. Possible Contractor Increase of 10% in the next few years; 3. Charging Water Usage directly to the LLMD; and 4. Create a long term Capital Replacement Fund." Item number 3 is discussed in more detail in the email, with the possible next step being "to allocate the water usage to each Zone in the LLMD." There is mention that Jennifer White had been working with City staff from utility billing to "get a summary of irrigation accounts that the City of Lincoln pays for." Per the email, of the 178 accounts located, about 77 were believed to be attributable to the LLMD; however, there were at least 10 meters for landscaped areas that could not be found and it was also believed that the City was paying for water accounts in several areas where an HOA was responsible for maintenance.
2013	Public Services Director Mark Miller is listed as the author on an extensive Excel Spreadsheet listing 179 water meters, including many on

	City property. It is unclear the purpose of this spreadsheet, but it may have been in response the LLMD work and effort to gather information on City irrigation accounts.[11] Notes taken by Interim City Attorney Bruce Cline in December 2017 indicate that Jon Hobbs advised Jim Estep that the City must deal with the municipal water issue.[12]
2014	City Manager Jim Estep leaves. Bill Zenoni serves as interim City Manager for a period of about 6 months. Efforts Zenoni was working on related to finance and utility billing may have been affected by this change.
Fall 2014	Jennifer Hanson hired as maintenance manager within the Public Services Department. Hanson is informed by Scott Miller, her boss at the time, of the "park water issue," regarding the City not currently billing itself for park water use. Hanson realized in subsequent meetings on the LLMD issue that the issue went beyond parks. In late 2014, Scott Miller's employment with the City ends. Hanson goes on maternity leave.
January 2015	Matt Brower is hired as City Manager.
Early 2015	Matt Brower invites Jennifer Hanson to meet with him while she is on maternity leave. When he asks her what his concerns should be, Hanson tells him that her focus would be on the "park water" issue, the new water rate study, and the LLMD issue.
Spring 2015	Hanson returns to work. Brower appoints her to the Public Services Director position. Hanson started discussions with Jennifer White from Francisco & Associates related to the "park water" issue. White sends Hanson an email which summarizes the 2013 discussions related to the

[11] Mark Miller stated in an interview that it is possible he started this spreadsheet to address the LLMD issue staff was working on, but he could not recall exactly its purpose.

[12] The date of this conversation between Hobbs and Estep is not mentioned. But it is likely it occurred during the development of the 2013 Water Rate Study.

	LLMD water use, and that "per Mark Miller at that time, we would not be including water in the LLMD." White's email also states concerns about making a decision on water billing that could unilaterally affect all 30 zones without a full study of the ramifications.[13]
Spring 2015-current	Hanson leads the effort to gather data on all water meters associated with City water use. This is a massive effort that continues today.
February 9, 2016	Hanson suggests to Finance Director Steve Ambrose in an email (cc'd to City Manager Matt Brower and City Attorney Jon Hobbs) that the City "make a run at having the parks pay the water bills in 16/17." The email states that the City has "now figured out the meters that belong to parks and facilities. I think we should pull the amounts and figure out what the liability is…."
February 10, 2016	Finance Director Ambrose responds to Hanson's email (and copies Hobbs and Brower), acknowledging that the City's practice of not paying for water is a problem, but expressing his desire to fully understand the impacts. He states that for "many years we've known the lack of payment for water use in the parks and L&L's is an issue. The problem is funding, and hopefully, the solution is reclaimed water…I was told a couple of years ago the number was approaching $1 million annually. I believe we need to get back to the expenditure report by L&L zone so that we can verify the funding limitations, which would include the cost of water…"
February 2016	Hanson called City Attorney Jon Hobbs regarding the email she sent on including City water use in the budget. Hobbs shared her concern and informed Hanson that he called City Manager Matt Brower about the issue.[14] The cost of the City's water use is not added to the 16/17 budget, although it is not clear whether this was an active or passive decision.

[13] Jennifer White is deceased and therefore could not be interviewed.

[14] Jon Hobbs does not specifically recall these details, but stated that Hanson is extremely credible and if this is what she stated occurred then it likely did. Hobbs stated that it is generally his practice to raise such issues with clients and he is confident he did so.

	Ambrose indicated that the budget is ultimately the City Manager's responsibility and that he was not comfortable putting it in the budget until the lighting and landscaping district issues related to water costs were understood. He focused on increasing City water conservation to control the costs. Brower did not recall the February 2016 email chain on the issue. He stated that he could not "remember that being an issue that galvanized us" and that he does not think he "would have caught the importance of it" at that time. He noted that this was the first full budget process he was leading for the City and he was implementing many changes and was focused on that. Hanson recalls that at this time that both Brower and Ambrose pushed to fix the landscaping and lighting district issues before adding City water use as a general fund expenditure.
Summer and Fall 2016	LIFT group forming; begins to focus on water rate issues.
2015-2017	City Attorney's office, staffed through Kronick Moskovitz law firm, advises City repeatedly to get new water rate study underway and to include City water use data in the study and that City must pay for its own water use.
Early 2017	Jennifer Hanson adds City water use costs to the 17/18 budget. No one removes it and so it remains in the budget.
January 2017	Contract awarded to Raftelis Financial Consultants to conduct new water rate study. In final stages now.
February-November 2017	Ad hoc water rate committee, consisting of residents and two councilmembers, holds at least 8 meetings and ultimately makes recommendations to the City Council.
March 2017	City suspends Tiers 4 and 5 water rates.
April 2017	*Jackson v. City of Lincoln* case filed challenging residential water rate structure.

October 2017	*Jackson* lawsuit settled. Water rate refunds required. City Council later, in February 2018, authorizes rebates that go beyond the requirements of the settlement agreement.
December 2017	LIFT and Ad Hoc Water Rate Committee member Ted Jones corresponds with City Manager Matt Brower, seeking answers to "lingering" questions related to water loss and financial data presented by the City. In response to the question of whether any "customers" receive "free or subsidized water," Brower states to Jones that he is "not aware of any external water customer accounts being subsidized." When Jones pushes for details on this response regarding internal City accounts, Brower responds: "I'm pretty confident there are no internal or external subsidies beings supported in the water fund. Other than, of course, the internal uses I mentioned in my email—use by fire department, when they pull water to fight fires, and general usage, such as when the City flushes lines, exercises fire hydrants."[15] Jones then makes a public records request for the City's own water bills. Interim City Attorney Bruce Cline gets involved and meets with City Manager and certain department heads; makes calls to City Council to inform them of the issue.

II. RELEVANT LAW

PROP 218:

California Constitution Article XIII(D)

[15] Prior to responding to Jones, Brower sent an email to Bruce Cline, Jennifer Hanson, and Steve Ambrose seeking feedback on his proposed response. Ambrose told Brower that his understanding was that the "leakage" being referred to is "City irrigation accounts." He also told Brower: "I think the City should make a public statement before LIFT sounds off as one of their findings. Historically the City did not require public parks and landscaping to pay for their water consumption, but rather it was paid for as part of the overall customer rates…." Hanson stated to Brower: "I tend to agree with Steve. I would just say what it is." Bruce Cline also advised Brower to not respond to Jones and to have a public discussion on the issue.

Section 2, Definitions.

Definitions. As used in this article:

(a) "Agency" means any local government as defined in subdivision (b) of Section 1 of Article XIII C.

(b) "Assessment" means any levy or charge upon real property by an agency for a special benefit conferred upon the real property. "Assessment" includes, but is not limited to, "special assessment," "benefit assessment," "maintenance assessment" and "special assessment tax."

(c) "Capital cost" means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency.

(d) "District" means an area determined by an agency to contain all parcels which will receive a special benefit from a proposed public improvement or property-related service.

(e) "Fee" or "charge" means any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service.

(f) "Maintenance and operation expenses" means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement.

(g) "Property ownership" shall be deemed to include tenancies of real property where tenants are directly liable to pay the assessment, fee, or charge in question.

(h) "Property-related service" means a public service having a direct relationship to property ownership.

(i) "Special benefit" means a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."

(Sec. 2 added Nov. 5, 1996, by Prop. 218. Initiative measure.)

Section 6, Property Related Fees and Charges.

(a) Procedures for New or Increased Fees and Charges. An agency shall follow the procedures pursuant to this section in imposing or increasing any fee or charge as defined pursuant to this article, including, but not limited to, the following:

(1) The parcels upon which a fee or charge is proposed for imposition shall be identified. The amount of the fee or charge proposed to be imposed upon each parcel shall be calculated. The agency shall provide written notice by mail of the proposed fee or charge to the record owner of each identified parcel upon which the fee or charge is proposed for imposition, the amount of the fee or charge proposed to be imposed upon each, the basis upon which the amount of the proposed fee or charge was calculated, the reason for the fee or charge, together with the date, time, and location of a public hearing on the proposed fee or charge.

(2) The agency shall conduct a public hearing upon the proposed fee or charge not less than 45 days after mailing the notice of the proposed fee or charge to the record owners of each identified parcel upon which the fee or charge is proposed for imposition. At the public hearing, the agency shall consider all protests against the proposed fee or charge. If written protests against the proposed fee or charge are presented by a majority of owners of the identified parcels, the agency shall not impose the fee or charge.

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted. Standby charges, whether characterized as charges or assessments, shall be classified as assessments and shall not be imposed without compliance with Section 4.

(5) No fee or charge may be imposed for general governmental services including, but not limited to, police, fire, ambulance or library services, where the service is available to the public at large in substantially the same manner as it is to property owners. Reliance by an agency on any parcel map, including, but not limited to, an assessor's parcel map, may be considered a significant factor in determining whether a fee or charge is imposed as an incident of property ownership for purposes of this article. In any legal action contesting the validity of a fee or charge, the burden shall be on the agency to demonstrate compliance with this article.

(c) Voter Approval for New or Increased Fees and Charges. Except for fees or charges for sewer, water, and refuse collection services, no property related fee or charge shall be imposed or increased unless and until that fee or charge is submitted and approved by a majority vote of the property owners of the property subject to the fee or charge or, at the option of the agency, by a two-thirds vote of the electorate residing in the affected area. The election shall be conducted not less than 45 days after the public hearing. An agency may adopt procedures similar to those for increases in assessments in the conduct of elections under this subdivision.

(d) Beginning July 1, 1997, all fees or charges shall comply with this section.

Lincoln Municipal Code Chapter 2.16: City Manager

2.16.050 - Powers and duties.

The city manager shall be the sole administrator of the policies and directions of the city council and subject to its direction and control. The city manager shall be responsible to the city council and its committees for efficient administration of all the affairs of the city which are under the city manager's control. The city manager shall have the power and duty:

(1) To see that all laws and ordinances are duly enforced;

(2) Perform the duties of the personnel officer and, with the consent of the city council, to consolidate or combine offices, positions, departments or units of the city;

(3) To exercise control over all departments and divisions of city government;

(4) To work closely with committees of the city council at all times on matters relating to the jurisdiction of the respective committees;

(5) To attend all meetings of the city council and its committees unless excused by the city council;

(6) To recommend to the city council for study or adoption such measures and ordinances as the administrator deems necessary or expedient;

(7) To purchase all supplies for all of the departments or divisions of the city, provided that any expenditures exceeding ten thousand dollars shall require approval by the budget committee, and any expenditure of more than thirty-five thousand dollars shall require approval by the city council. Items specifically budgeted in the city's annual budget are excluded from this requirement;

(8) To make investigations into the affairs of the city, and any department or division of the city, and to require the proper performance of any contract or obligation for the benefit of the city;

(9) To investigate all complaints in relation to matters concerning the administration of the government of the city and in regard to the services maintained by public utilities in the city, and to see that all franchises, permits, and privileges granted by the city are faithfully observed;

(10) In cooperation with the city council committee concerned, to exercise general supervision over all public buildings, public parks, streets and other public property which are under the control and jurisdiction of the city council;

(11) To devote full time to the duties and interests of the city;

(12) To prepare and submit to the city council an organization chart showing the plan for all departments of the city government;

(13) To issue on behalf of the city council all licenses and permits not otherwise provided for by ordinance;

(14) To superintend the construction of all public works within the city;

(15) To make, compile and file with the city clerk a complete inventory of the property, real and personal, owned by the city, and file amended inventories thereof at least semiannually as to stock supplies and equipment, and at least annually as to other properties;

(16) To serve in any appointed office or as head of any department within the city government when appointed thereto by the city council, and to hold and perform the duties thereof at the pleasure of the council;

(17) To compromise and/or settle claims filed against the city in the amount of $25,000.00 or less. The city manager shall report the settlement of any claims under this subsection to the city council by the next city council meeting after the settlement of the claim.

(18) To perform such other duties and exercise such other powers as may be delegated from time to time by ordinance or resolution of the city council;

(19) To draft, adopt, and maintain administrative policies and to maintain an administrative policy manual. Said administrative policy manual may contain standard operating procedures and administrative policies designed to facilitate the effective operation of the city.

Lincoln Municipal Code Chapter 2.20 – Finance Director:

2.20.010 - Office established.

The office of director of finance for the city is established.

2.20.020 - Appointment of city administrator.

The city administrator or the administrator's designee is appointed the director of finance and shall fulfill the duties of the office as set forth in the applicable laws of the state of California and as stated herein.

2.20.030 - Duties.

The duties of the director of finance shall be as follows:

(1) Those duties set forth in sections 37202 through 37209 and 40802 through 40805 of the Government Code of the state of California;

(2) To keep the council at all times fully advised as to the financial condition and needs of the city;

(3) To prepare and submit to the city council as of the end of the fiscal year a complete report of the finances and administrative activities of the city for the preceding year;

(4) To prepare and submit, together with the city council budget committee, the annual city budget to the city council.

2.20.040 - Bond.

The director of finance shall execute a bond to the city in an amount fixed by resolution of the city council.

(Ord. 397B §4, 1981)

III. GENERAL PROPOSITION 218 ANALYSIS

Local governments must follow specific regulations concerning water service rates. Proposition 218, adopted by California voters in 1996, creates limitations on taxes, fees, assessments, and charges imposed by local governments on a person or a parcel. Its provisions apply to "property related fees and charges" that are imposed "upon a parcel or upon a person as an incident of property ownership, including a user fee for a property related service."[16] Proposition 218 defines "property-related service" as "a public service having a direct relationship to property ownership."[17] Services specifically mentioned in section 6, subdivision (c), such as water, sewer, and trash collection services, are generally considered property-related services if provided by a local agency.[18] Proposition 218 regulations, therefore, apply to water service rates imposed by a city.

As is relevant here, Proposition 218 requires that:

1) Water rate revenue not be used for a "purpose other than that for which the fee or charge was imposed",[19]

2) **Water rate amounts "not exceed the proportional cost of the service attributable to the parcel",[20]**

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[16] Cal. Const. art. 13 D, § 2, subd. (e).

[17] Cal. Const., art. 13 D, § 2, subd. (e).

[18] *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 at 428; *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205.

[19] Cal. Const. art. 13 D, § 6, subd. (b)(2).

[20] Cal. Const. art. 13 D, § 6, subd. (b)(3).

3) A fee may not "be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question,"[21] and

3) No fees be imposed "for general government services" such as police or fire services.[22]

Arguably, the City's practice of not charging itself for its own water use (and presumably passing this cost on to rate payers in the rate amounts) runs afoul of the Proposition 218 requirements listed above. Although there is no court case directly on point, the general arguments in support of this are that: i) such practice results in an individual parcel or property owner paying for a service (such as watering the parks or the availability of drinking water at City Hall) that is not actually used by or immediately available to that particular property owner/parcel; and ii) such practice results in the water rate exceeding the proportional cost of the service attributable to that particular parcel (because it includes costs of providing services to City property).

On the other hand, a city could potentially defend the practice by demonstrating that the general fund provides other services to the water utility (such as right of way access, administrative services, and police and fire service) and such services offset the cost of free water received by the City.[23] Although the water rates borne by rate payers likely include the costs of providing water to City properties, this "extra" amount could be proportional to the cost of the services rate payers receive overall because the water utility receives benefits from the general fund equal to the "extra" amounts in the rates.

Page 10 of the 2013 Water Rate study states that the water utility makes transfers to the general fund "for services provided to the water enterprise" and that the "City conducts annual analyses to allocate governmental overhead to each of the enterprises to ensure that each enterprise provides full reimbursement for services received." It is not clear if this allocation takes into account the free water received by the general fund as a result of it not being billed for water use. Such amounts would arguably need to be subtracted from the overhead costs of the water enterprise prior to it making a transfer to the general fund.

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[21] Cal. Const. art .13 D, § 6, subd. (b)(4).

[22] Cal. Const. art.13 D, § 6, subd. (b)(5).

[23] See *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637 and *Howard Jarvis Taxpayers Ass'n v. City of Fresno* (2005) 127 Cal.App.4th 914.

Although the City's practice of not billing itself for water use is clearly not "best practice" under the requirements of Proposition 218, it is potentially defensible if there is support to show that the overall fees are proportional to the cost of service provided. Essentially, the practice must be based upon an analysis of the actual costs to show that any "extra" amount in the rates charged to customers reasonably represents the proportional cost of providing water service.[24] This memorandum does not include a full evaluation of the defensibility of this practice, as the focus is on the history of the City's water use practices and the failure to modify it.

V. CONCLUSIONS

It appears that following the enactment of Proposition 218 in January 1997, the City continued its established practice of not directly billing itself for its own water use. Such practice was highlighted publicly in the 2004 Water Rate Study by HF&F. The 2004 study clearly recommended that the City change the practice by installing meters and billing itself for water use. Despite general knowledge of the practice among city staff, meaningful progress was not made on changing it until 2015 and this progress continues today.

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[24] *Roseville*, 97 Cal.App.4th at pp 647-648 (citations omitted) and *Fresno*, 127 Cal.App.4th at pp. 922-923 (citations omitted).